

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON
DIVISION II

NO. 45533-1-II

STATE OF WASHINGTON

Respondent,

vs.

Joshua Pettis

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY

BRIEF OF RESPONDENT

SCOTT ROSEKRANS
Jefferson County Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

Date: July 9, 2014

TABLE OF CONTENTS

	<u>Page</u>
A. Summary of Argument	Error! Bookmark not defined.
B. Restatement of Issues	2
C. Statement of the Case.....	2
D. Argument	6
I. The trial court had authority under RCW 9.94A.753(5) to order restitution.....	6
a. Standard of Review	6
b. Authority for Restitution	7
II. Mr. Pettis received effective assistance of counsel.	9
a. Standard of Review	9
b. The plea bargain gave statutory authority.	10
III. The evidence was sufficient for the court to properly determine the restitution amount.....	10
a. Standard of Review	10
b. The court had exact loss evidence	11
E. Conclusion	13

TABLE OF AUTHORITIES

Page

CASES

Washington Supreme Court Cases

<i>State v. Davison</i> , 116 Wn.2d 917, 809 P.2d 1374 (1991)	6
<i>State v. Eilts</i> , 94 Wn.2d 489, 617 P.2d 993 (1980)	8
<i>State v. Enstone</i> , 137 Wn.2d 675, 974 P.2d 828 (1999)	7, 12
<i>State v. Griffith</i> , 164 Wn.2d 960, 195 P.3d 506 (2008)	7, 10
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	9, 10
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999)	9

Washington Appeals Court Cases

<i>State v. Fleming</i> , 75 Wn.App. 270, 877 P.2d 243 (1994)	12
<i>State v. Johnson</i> , 69 Wn.App. 189, 847 P.2d 960 (1993);	12
<i>State v. Pollard</i> , 66 Wn.App. 779, 834 P.2d 51 (1992)	12
<i>State v. R.G.P.</i> , 175 Wn.App. 131, 302 P.3d 885, review denied, 178 Wn.2d 1020 (2013)	11
<i>State v. Ryan</i> , 78 Wn.App. 758, 899 P.2d 825 (1995)	12
<i>State v. Tindal</i> , 50 Wn.App. 401, 748 P.2d 695 (1988)	12
<i>State v. White</i> , 80 Wn.App. 406, 907 P.2d 310 (1995)	9

State Statutes

RCW 9.94A.142	11
RCW 9.94A.753(5)	1, 2, 8, 10

A. Summary of Argument

Mr. Pettis admitted severely damaging a steel girder bridge belonging to the U.S. Forest Service by cutting out pieces of it to sell for scrap metal. He was originally charged with theft in the first degree and had methamphetamine in his pocket when arrested. The trial court, the State, and he agreed his drug addiction was a causal factor and a plea agreement was reached for him to plead guilty to drug possession, receive a community custody sentence with drug treatment, and pay restitution. The trial court, after holding a restitution hearing, found the restitution should be \$62,666.

He now asks this court to free him of his restitution obligation because he was not convicted of the theft charge. The State requests the court to deny this appeal because RCW 9.94A.753(5) authorizes a court to impose restitution when defendant's crime causes a victim's loss and defendant pleads guilty to a different charge under a plea agreement.

B. Restatement of Issues

1. The trial court had authority under RCW 9.94A.753(5) to order restitution.
2. Mr. Pettis received effective assistance of counsel.
3. The evidence was sufficient for the court to properly determine the restitution amount.

C. Statement of the Case

On June 9, 2012, witnesses reported to police that they saw two men cutting up a steel bridge located on United States Forest Service land in Jefferson County with an oxyacetylene torch and loading the pieces on a flatbed trailer. VRP 70. When officers arrived at the scene, the men had left and some of the remaining sections of the bridge were still warm to the touch. VRP 85. Mr. Pettis and another man were stopped in Grays Harbor County based on information provided by the witnesses. VRP 87. Mr. Pettis was found in possession of methamphetamine when arrested. VRP 10-11.

Deputy Allen testified that Mr. Pettis admitted taking a total of 5 tons of steel from the bridge in two separate instances. VRP 88.

On June 11, 2012, Mr. Pettis was charged by information with first degree theft. CP 1-4.

On December 14, 2012, the court heard that Mr. Pettis and the State agreed to a negotiated plea of guilty to second degree theft and the State's recommendation of 2-5 months in custody, payment of LFOs, payment of \$188,000 restitution, and a residential DOSA. VRP 4. The court pointed out that a sentence of 2-5 months would not qualify Mr. Pettis for a residential DOSA. VRP 6.

On December 21, 2012, the court heard a revised negotiated plea from the parties. The State filed a second amended information charging Mr. Pettis with possession of methamphetamine on June 9, 2012 in Jefferson County. CP 5-6. Mr. Pettis signed a guilty plea form for this charge at the hearing. CP 7-16. The plea form included the understanding that the prosecutor would recommend to the judge:

- Credit for time served

- 12 months of community custody with treatment ordered
 - \$1,450 legal financial obligations
 - \$188,000 restitution to U.S. Forest Service
- CP 10.

Both the State and Mr. Pettis agreed that “he needs to get into treatment and that may prevent the criminal activity.” VRP 10. They also agreed that Mr. Pettis was pleading to a lesser charge for which there was insufficient evidence to prove guilt so that he could obtain the benefit of the plea offer. VRP 16-17. The court found that Mr. Pettis guilty plea was made “knowingly, intelligently, and voluntarily” and that he “understand[s] the consequences of it.” VRP 17. The court sentenced Mr. Pettis as the prosecution recommended save that a restitution hearing was set for March 29, 2013, to determine the amount of restitution.

The restitution hearing was delayed and held on August 2, 2013. The court heard testimony from Douglas Meyers, the representative from Big R Bridge, the original fabricator of the bridge and the individual responsible for the \$188,000 estimate to repair the bridge; Jefferson County Sheriff’s Deputy Derek Allen, the chief investigator; Shannon Robert Henriquez, a civil engineer

and the U.S Forest Service employee responsible for the bridge; and Mr. Pettis. VRP 26-183.

Mr. Enriquez testified that he performed an inventory of the bridge. VRP 12, 132. The bridge comprised six sections or “modules.” VRP 49, 126. Two modules were untouched, two modules were missing, one module was damaged and repairable, and one module was damaged and un-repairable. VRP 133.

Mr. Myers testified that he and his staff had prepared an estimate of the cost to return the bridge to serviceable condition of \$188,000. VRP 44, CP 27. Individual costs for components, labor, shipping and other costs were not generated. This is, of course, the actual loss suffered by the victim.

On August 9, 2013, the court gave its finding on restitution. VRP 185-192. The court explained that it used the estimate of victim loss and then estimated the share of that damage attributable to Mr. Pettis based on all the testimony at the restitution hearing. The court determined that Mr. Pettis could reasonably have participated in damaging two sections of the bridge. VRP 185-89. The court explained that, based on its analysis, the actual loss caused by Mr. Pettis was \$62,666. VRP 189.

However, due to Mr. Pettis income, disabilities, medical and tax liabilities, the “chances of him paying even \$62,000.00 are, in my mind nil.” VRP 189-90. The court determined that the most he could pay was \$24,000 and ordered that he pay that amount in restitution, joint and severable with any others found liable. VRP 190.

On August 16, 2013, the State filed a Motion to Reconsider Restitution. That motion was heard on September 27, 2013, and the court adjusted the restitution amount to the amount of loss, \$62,666. VRP 191-198.

Mr. Pettis timely appealed the restitution order.

D. Argument

I. The trial court had authority under RCW 9.94A.753(5) to order restitution.

a. Standard of Review

The standard of review for restitution orders is abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A trial court abuses its discretion when it exercises it in a

manifestly unreasonable manner or on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679–80, 974 P.2d 828 (1999).

b. Authority for Restitution

Mr. Pettis argues that the trial court lacked authority to impose restitution for an uncharged crime because the restitution was not for the charged crime of drug possession, there was no causal connection between the charged crime and the victim's loss, and he did not expressly agree to pay restitution for the uncharged crime.

Mr. Pettis cites *State v. Griffith*, 164 Wn.2d 960, 195 P.3d 506 (2008), to support his argument. *Griffith* is distinguishable because in *Griffith* the defendant pleaded guilty to possession of a certain number of stolen items, but there were indications that she possessed more. After a full evidentiary hearing, the sentencing court found that Griffith was in possession of \$11,500 in stolen property and ordered her to pay restitution in that amount. The Supreme Court vacated the order and remanded for a new restitution hearing because the trial court's finding was not supported by substantial evidence. Here, Mr. Pettis admitted to

second degree theft then a plea agreement was reached where he pled to a lesser charge of drug possession which included a restitution order.

RCW 9.94A.753(5) authorizes a court to impose restitution and states:

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. *In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement. (Emphasis added)*

A defendant may be ordered to pay restitution beyond the scope of the crime charged if there is express agreement to the restitution as part of a plea bargain. *State v. Eilts*, 94 Wn.2d 489, 494, 617 P.2d 993 (1980)

Here, Mr. Pettis expressly agreed to pay restitution to the U.S. Forest Service as part of a plea agreement that he signed. CP 10. This agreement was heard in open court and the court found

that Mr. Pettis guilty plea was made “knowingly, intelligently, and voluntarily” and that he “understand[s] the consequences of it.” VRP 17. The court sentenced Mr. Pettis as the prosecution recommended save that a restitution hearing was set for March 29, 2013, to determine the amount of restitution.

Since Mr. Pettis “knowingly, intelligently, and voluntarily” agreed to the plea bargain, including paying restitution to the U.S. Forest Service, the court had statutory authority to order restitution under RCW 9.94A.753(5) and this appeal is without merit.

II. Mr. Pettis received effective assistance of counsel.

a. Standard of Review

Review of a challenge to effective assistance of counsel is de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). We start with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). This requires the defendant to demonstrate from the record the absence of legitimate strategic or

tactical reasons to support counsel's challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

b. The plea bargain gave statutory authority.

Mr. Pettis argues the trial court did not have authority to enter a restitution order therefore his counsel was ineffective because no objection was made to the ordering of restitution. As shown in Issue I above, the court did have authority under RCW 9.94A.753(5) to order restitution and defense counsel was not ineffective for not objecting. This issue is without merit.

III. The evidence was sufficient for the court to properly determine the restitution amount.

a. Standard of Review

Challenges to the amount of restitution are reviewed for an abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds." *State v. R.G.P.*, 175 Wn.App. 131, 136, 302 P.3d 885, review denied, 178 Wn.2d 1020 (2013). A decision is based on untenable grounds when the

court bases its decision on an incorrect interpretation of the law.
R.G.P., 175 Wn.App. at 136.

b. The court had exact loss evidence.

Mr. Pettis argues the court improperly resorted to speculation and conjecture to determine the amount of restitution it ordered.

The following two statutory principles regarding the imposition of restitution are particularly relevant here: (a) “restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury,” RCW 9.94A.142(1) and (b) “[r]estitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property,” RCW 9.94A.142(2)¹

Here the damage was only to property, so the restitution must be based on “easily ascertainable damages for injury to or loss of property.”

¹ The victim did not apply for relief under the crime victims' compensation act (CVCA), RCW 7.68. Thus, the State concedes that RCW 9.94A.142(4), which provides for restitution where the victim is entitled to benefits under the CVCA, is not applicable.

“[E]asily ascertainable” damages “need not be established with specific accuracy.” *State v. Fleming*, 75 Wn.App. 270, 274, 877 P.2d 243 (1994) (citing RCW 9.94A.142(1); *State v. Johnson*, 69 Wn.App. 189, 194, 847 P.2d 960 (1993); *State v. Pollard*, 66 Wn.App. 779, 785, 834 P.2d 51 (1992)). Evidence of damages is sufficient if it provides the trial court with a reasonable basis for estimating losses and requires no speculation or conjecture. *Fleming*, 75 Wn.App. at 274–75, 877 P.2d 243; *Pollard*, 66 Wn.App. at 785, 834 P.2d 51. The trial court may determine the amount of restitution “by either (1) the defendant’s admission or acknowledgment or (2) a preponderance of the evidence.” *State v. Ryan*, 78 Wn.App. 758, 761, 899 P.2d 825 (1995) (citing *State v. Tindal*, 50 Wn.App. 401, 403, 748 P.2d 695 (1988)); *Enstone*, 137 Wn.2d at 682, 974 P.2d 828.

Here, the actual loss suffered by the victim was determined by the original fabricator of the bridge to be \$188,000. VRP 44. This was neither speculative nor conjectural. The court then conducted a reasoned analysis of the testimony from Deputy Allen, Mr. Pettis, Mr. Myers, and Mr. Enriquez to determine the amount of damage to be borne by Mr. Pettis. VRP 185-89

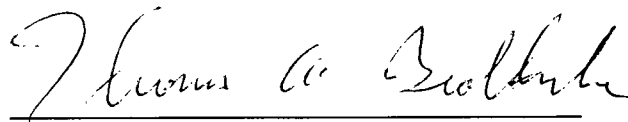
The court properly determined the amount of restitution Mr. Pettis should pay. There was no error.

E. Conclusion

The trial court properly ordered restitution and correctly determined the amount, therefore, the State respectfully requests that this Court affirm the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 9th day of July, 2014

SCOTT ROSEKRANS,
Jefferson County Prosecuting Attorney

A handwritten signature in cursive script, reading "Thomas A. Brotherton", is written over a horizontal line.

By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Wendy M. Davis, certify that on this date:

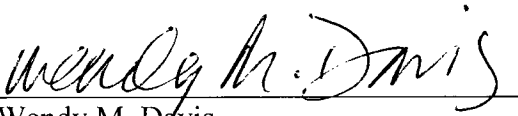
I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the brief, using the Court's filing portal, to:

Kathleen A. Shea
Washington Appellate Project
kate@washapp.org

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on July 10, 2014.



Wendy M. Davis
Legal Assistant

JEFFERSON COUNTY PROSECUTOR

July 10, 2014 - 10:23 AM

Transmittal Letter

Document Uploaded: 455331-Respondent's Brief.pdf

Case Name: State of Washington vs Pettis

Court of Appeals Case Number: 45533-1

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Wendy M Davis - Email: wdavis@co.jefferson.wa.us

A copy of this document has been emailed to the following addresses:

kate@washapp.org